



May 20, 2002

Ms. Leah Simon
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2002-2692

Dear Ms. Simon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163166.

The Waco Police Department (the “department”) received a request for a copy of the tape recording of the 911 call pertaining to case number 02-011969. You have submitted to this office for review a copy of case report number 02-011969, and other law enforcement documents, along with the requested audiotape. We assume that the law enforcement documents and case report were submitted for informational purposes only, and therefore, we do not address whether any portion of those documents are subject to required public disclosure. We will, however, consider your claim that the requested audiotape is excepted from disclosure under sections 552.103 and 552.108 of the Government Code.

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you state that release of the requested information "would interfere with the pending investigation and prosecution relating to the offense." Based on this statement, we presume that the litigation to which you refer is the potential prosecution of the offense. We note, however, that the department would not be a party to this litigation. Furthermore, you have not provided a representation from the attorney with prosecutorial interest that the information should be withheld under section 552.103. Consequently, we conclude that you have not met your section 552.103 burden. See Open Records Decision No. 469 at 2 (1987). Therefore, the requested information may not be withheld pursuant to section 552.103.

The department also claims that the requested information is excepted under section 552.108. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. See Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the "requested 911 tape contains information which is excepted from disclosure under section 552.108 because the tape contains information held by a law enforcement agency dealing with the detection, investigation, and/or prosecution of crime which is still pending." You further state that "release of this information would interfere with the pending investigation and prosecution relating to the offense." However, the submitted offense report states "[t]here is no further need for Police investigation in reference to this case," and the case is closed. Because of these conflicting statements regarding the status of the case, we find that you have not demonstrated the applicability of section 552.108(a)(1). Furthermore, you do not demonstrate that the 911 tape is excepted under any other provision of section 552.108. Therefore, the department may not withhold the

requested information under section 552.108. The department must release the requested information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

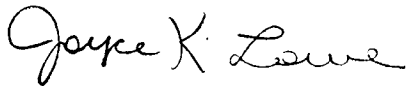
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Joyce K. Lowe".

Joyce K. Lowe
Assistant Attorney General
Open Records Division

JKL/sdk

Ref: ID# 163166

Enc: Submitted documents

c: Ms. Doris Williams
P.O. Box 202
Eddy, Texas 76524
(w/o enclosures)